

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY JOE GREEN,

Defendant-Appellant.

UNPUBLISHED

November 25, 2003

No. 242230

Kent Circuit Court

LC Nos. 01-002309-FH &
01-007641-FH

Before: Cooper, P.J., and Markey and Meter, JJ.

MEMORANDUM.

Defendant appeals as of right his jury conviction for two counts of breaking and entering a business, MCL 750.110. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant asserts that he was denied the effective assistance of counsel, who stipulated to a joint trial of two unrelated incidents. An ineffective assistance of counsel claim requires a defendant to show that his counsel's performance fell below prevailing professional norms and prejudiced him to the extent that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The defendant must also overcome a strong presumption that counsel's actions constituted sound trial strategy. *Id.*

Although defendant had the right to insist on separate trials, MCR 6.120(B), the decision to have a joint trial is a matter of trial strategy. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant has failed to show a reasonable probability that the outcome would have been different had counsel elected to proceed with separate trials.

Defendant also asserts that defects in the Kent County jury selection system deprived him of the right to an impartial jury drawn from a fair cross section of the community. "To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systemic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000); see also *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). To preserve a challenge to the jury array, a defendant must raise his challenge before the jury has been impaneled and sworn. *People v*

Dixon, 217 Mich App 400, 404; 552 NW2d 663 (1996). Where a defendant fails to create a factual record to support his claim, he has forfeited appellate consideration of the issue. *Id.*

Defendant has forfeited appellate review of this issue. He failed to raise any objection at trial, and expressed satisfaction with the jury. He has presented no evidence regarding the racial composition of the venire or the jury that was selected. Defendant cannot establish a prima facie case in the absence of factual support.

Affirmed.

/s/ Jessica R. Cooper

/s/ Jane E. Markey

/s/ Patrick M. Meter